No. 89-931

In the Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND AUDUBON SOCIETY, ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the district court's dismissal of petitioners' claim that the Bureau of Land Management's supervision of certain forest lands in western Oregon violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 884 F.2d 1233. The first opinion of the court of appeals (Pet. App. A24-A42) is reported at 866 F.2d 302. The opinion of the district court on remand from the court of appeals (Pet. App. A43-A124) is reported at 712 F. Supp. 1456. The initial opinion of the district court (Pet. App. A127-A144) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1989. The petition for a writ of certiorari was filed on December 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1979 and 1983, the Bureau of Land Management of the United States Department of the Interior adopted timber management plans to govern sales during the 1980s of timber on each of the several districts of BLM-managed lands in western Oregon.[1] The plans provide for the sale and harvest of substantial amounts of old-growth timber. Old-growth forests provide natural habitat for the northern spotted owl, and thus the timber management plans were accompanied by environmental impact statements which addressed, among other things, the impact of logging old-growth timber on the spotted owl population in Oregon. In April 1987, after issuing a supplemental "Spotted Owl Environmental As-

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[1] Most of these lands are revested Oregon and California Railroad and Coos Bay Wagon Road grant lands that the BLM manages under the Oregon and California Railroad Lands Revestment Act (OCLA) (Act of Aug. 28, 1937, ch. 876, 50 Stat. 874), 43 U.S.C. 1181a *et seq.* See *Skoko* v. *Andrus*, 638 F.2d 1154 (9th Cir.), cert. denied, 444 U.S. 927 (1979). OCLA provides that "timber from said lands in an amount * * * not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually * * *." 43 U.S.C. 1181a. Congress has thus dedicated these federal lands to management for the "primary use" of sustained-yield timber production. *O'Neal* v. *United States*, 814 F.2d 1285, 1287 (9th Cir. 1987). The remaining lands under BLM's management in western Oregon are public domain lands.

sessment," the BLM decided to continue logging old-growth timber as proposed in the original timber management plans. Pet. App. A133; see *id.* at A130-A133.

Petitioners, a number of environmental groups, contended that such logging would destroy the spotted owl's natural habitat and thus hasten extinction of that species. Petitioners therefore filed an administrative appeal of the BLM's decision to the Interior Board of Land Appeals. Petitioners also asked the Board to stay many of the BLM's timber sales pending the preparation and assessment of supplemental environmental impact statements concerning the effect of logging old-growth timber on the spotted owl. By October 1987, however, the Board had refused to stay the BLM's timber sales. Pet. App. A133-A135.[2]

2. a. In October 1987, petitioners filed this action against the Secretary of the Interior in the United States District Court for the District of Oregon. Petitioners contended that the BLM's decision to continue logging old-growth timber, without adequately considering the detrimental effects to the spotted owl population, violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In addition, petitioners alleged claims under the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a *et seq.*, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* Petitioners sought declaratory and injunctive relief barring the Secretary from con-

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[2] In February 1988, after petitioners had filed this action, the Board issued its final decision upholding the BLM's decision. Pet. App. A57.

tinuing to implement his plans for logging old-growth timber on BLM-managed lands in Oregon. Pet. App. A135-A136; see *id.* at A159-A161.[3]

With respect to petitioners' claim under NEPA, the complaint alleged that

> [t]he limited information reviewed by the BLM in [the environmental impact statements accompanying the initial timber management plans] indicated that the logging of old-growth forests would result in a decline in the number of spotted owls on [BLM-managed] lands in western Oregon.

Pet. App. A154 (¶ 10). The complaint further alleged that "significant new information concerning the northern spotted owl" had been developed after the preparation of the BLM's initial plans, *ibid.* (¶ 11), and that the BLM neither addressed nor considered "any of the new information contained in the many studies of the northern spotted owl that have been released since the completion of [the initial environmental impact statements]," *id.* at A155 (¶ 13). Lastly, the complaint alleged that the continued sale and harvest of old-growth timber without the BLM's first preparing supplemental environmental impact statements based on such new information will cause

> old-growth forests on BLM lands in western Oregon [to] be logged at a rate that will foreclose [the Secretary's] ability to provide meaningful protection for the northern spotted owl and other old-growth dependent species.

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[3] The district court later granted motions filed by respondents, members of the Oregon timber industry, to intervene as defendants. See Pet. App. A27.

Ibid. (¶ 14). The complaint thus sought immediate declaratory and injunctive relief, alleging that "[n]ew resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction [, as permitted by the BLM's decision]." *Ibid.* (¶ 14).

b. The Secretary filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and (6), contending, among other grounds, that Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, Tit. III, § 314, 101 Stat. 1329-254, precluded judicial review of petitioners' claims. That enactment provided, in pertinent part:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. * * * [T]he Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254.[4]

The Secretary contended that Section 314 barred petitioners' claims since that lawsuit sought

> to prevent the BLM from managing timber resources under existing Timber Management Plans because [those [p]lans] do not incorporate information made available subsequent to the adoption of the plans relating to the northern spotted owl and other old-growth dependent species.

Pet. App. A138.

Petitioners countered that Section 314 did not preclude their lawsuit, since that action "is not a challenge to existing land management plans in their entirety." Pet. App. A140. Moreover, petitioners contended that Section 314 "allows challenges to Timber Management Plans if the concerns raised by newly obtained information are substantive in nature." *Ibid.* Lastly, petitioners argued that Section 314 could not "repeal by implication" the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. A140.

3. In April 1988, the district court granted the Secretary's motion, holding that Section 314 "operates to preclude [petitioners'] entire action." Pet. App. A144. The district court reviewed petitioners' complaint, finding that petitioners alleged that the BLM's "Timber Management Plans are outdated as

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[4] Congress has since extended that express provision through fiscal years 1989 and 1990. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826; Department of the Interior and Related Agencies Appropriations Act, 1990 (Act of Oct. 23, 1989), Pub. L. No. 101-121, Tit. III, § 312, 103 Stat. 743.

they relate to the treatment of the northern spotted owl," and that petitioners based that allegation "solely upon new information which has become available since the completion of the existing Timber Management Plans." *Id.* at A142. The court therefore concluded that petitioners' complaint "contains the precise challenge that Congress intended to limit in section 314 * * * [, since] Congress intended to prohibit judicial review of challenges to existing Timber Management Plans on the basis that they do not incorporate information which has become available after the adoption of the existing * * * Plans." *Ibid.*

The district court also rejected petitioners' claim that Section 314 could not trump the availability of judicial review under the APA. In the court's view, "[t]he fact that Congress did not make a citation to the APA in limiting the review allowable does not change Congress' stated intent to limit all judicial review except as noted whether it be pursuant to the APA or another statute. Judicial review under the APA is subject to the structure of the statutory scheme under which relief is requested." Pet. App. A142-A143 (citing *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345-346 (1984)). Since Congress "has the power to limit the availability of judicial relief" under NEPA, OCLA, FLPMA, and MBTA, the court concluded that Congress, in Section 314, precluded judicial review under the APA. Pet. App. A143-A144.

Petitioners appealed the district court's order and sought a temporary injunction preventing the logging of old-growth timber pending disposition of the appeal. The court of appeals granted that request and temporarily enjoined certain logging activities in western Oregon. See Pet. App. A27.

4. In January 1989, the court of appeals reversed the district court's judgment dismissing petitioners' action and remanded the case for further proceedings. Pet. App. A24-A42.[5] The court of appeals stated that Section 314's bar to judicial review depended on an application of the following "key words"—"solely" and "information available subsequent to the completion of the existing plan." *Id.* at A30. The court then concluded that the district court had not adequately determined whether petitioners' complaint in fact relied "solely upon new information," *id.* at A33, observing that petitioners' claims under OCLA, FLPMA, and MBTA, did not appear to be based on such new information, *id.* at A32-A33. The court of appeals therefore directed the district court on remand to resolve that issue, suggesting that proof at trial might "shed light on the 'new information' problem." *Id.* at A37.

The court of appeals also concluded that the district court had not adequately considered whether the final proviso of Section 314 applied to petitioners' action, namely, "[t]hat any and all particular activities to be carried out under existing plans may nevertheless be challenged," 101 Stat. 1329-254. In the court of appeals' view, that proviso required the district court "to decide whether the challenge is to the [timber management] plan or to particular activities." Pet. App. A37. The court therefore also instructed the district court on remand to determine whether the complaint challenged the BLM's "existing plans" or "particular activities," such as timber sales, within the meaning of Section 314. *Ibid.*

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[5] The court of appeals also vacated the stay pending appeal. Pet. App. A42.

5. In May 1989, after holding an extensive evidentiary hearing on cross-motions for summary judgment, the district court granted the Secretary's motion and again dismissed petitioners' complaint. Pet. App. A43-A124.[6]

The district court, following the court of appeals' mandate, first considered whether petitioners based their NEPA claim solely upon "new information" within the meaning of Section 314. The court reviewed the record and found that

> [t]he reports and studies relied upon by [petitioners] were published after the existing Timber Management Plans and Environmental impact Statements were completed. The information contained in [those] reports and studies * * * was not available prior to the completion of the existing Timber Management Plans and Environmental Impact Statements.

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[6] The district court dismissed petitioners' claims under OCLA, FLPMA, and MBTA, on the ground that petitioners had "failed to pursue [those] claims * * * in a timely manner." Pet. App. A111. The court of appeals, however, later reversed that aspect of the district court's judgment and remanded for further proceedings. *Id.* at A19-A22. Those claims are not presented for this Court's review.

On the second remand from the court of appeals (and after the instant petition for a writ of certiorari had been filed), the district court, on December 21, 1989, dismissed as moot the remainder of petitioners' complaint in light of the recently enacted express provision of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747. *Portland Audubon Society* v. *Manuel Lujan, Jr.*, Civil No. 87-1160-FR (D. Ore. Dec. 21, 1989), slip op. 4-10. See pp. 12-13, *infra*. Petitioners' appeal from that judgment is currently pending in the court of appeals. *Portland Audubon Society* v. *Manuel Lujan, Jr.*, No. 90-35120 (9th Cir.).

Pet. App. A117. The court therefore concluded that petitioners did rely "solely upon 'new information' in [their] challenge to the BLM's decision not to issue a supplemental Environmental Impact Statement." *Ibid.*

The court then considered whether petitioners' action could nonetheless proceed under the final proviso of Section 314, that is, whether the NEPA claim was a permissible challenge to "particular activities to be carried out under existing plans," as opposed to a challenge to BLM's "existing [management] plan[s]" that Section 314 expressly precluded. 101 Stat. 1329-254. The court construed Section 314 as permitting "the BLM to operate under [its existing Timber Management Plans] pending the completion of new * * * Plans in 1990 without judicial challenges to existing * * * Plans based upon claims that new information requires different action." Pet. App. A122-A123. But Section 314, in the court's view, also "allows a judicial challenge to particular BLM activities on a case-by-case, site-specific basis." *Id.* at A123.

Here, the court determined that petitioners' NEPA claim was not such a permissible challenge to particular BLM activities because petitioners "present[ed] no new information which is site-specific to any proposed timber sale activity * * * [and did] not seek judicial review of an activity of the BLM based on site-specific new information, such as the discovery of a bald eagle nest or an arch[a]eological 'find' or a blow down of timber on a particular sale location." Pet. App. A123. The court therefore concluded that petitioners' "challenge cannot reasonably be characterized as a challenge to 'particular activity'

for which judicial review is available under Section 314." *Ibid.*[7]

In sum, the court held that Section 314 "preclude[d] judicial review because this case is based solely upon [petitioners'] claim that the Timber Management Plans do not incorporate new information available subsequent to the adoption of the plans." Pet. App. A124. In these circumstances, the court also held that "[t]he facts of this case preclude it from being deemed a challenge to a 'particular activity' of the BLM" within the meaning of Section 314. *Ibid.*

6. In September 1989, the court of appeals affirmed the district court's dismissal of petitioners' NEPA claim under Section 314. Pet. App. A1-A23; see also note 6, *supra*.[8] In the court of appeals, petitioners did not challenge the district court's finding that their NEPA claim was based solely upon "new information," and thus otherwise precluded under Section 314. Pet. App. A11. Instead, petitioners argued that the district court erroneously concluded that their claim was an impermissible challenge to existing BLM timber management plans, rather than

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[7] The court also observed that

> [i]f "particular activity" were meant to be so broad as to include [petitioners'] challenge, the statute's intent that the BLM continue under existing Timber Management Plans until new plans were completed would have no meaning.

Pet. App. A123-A124.

[8] The court of appeals considered petitioners' appeal on an expedited basis and had stayed further sales of old-growth timber over large areas of BLM-managed lands in western Oregon pending disposition of the appeal. See Pet. App. A2. The court of appeals vacated that stay when it issued its decision. See *id.* at A22.

the sort of challenge to "particular activities" that Section 314 expressly permits. *Ibid.*

The court of appeals found, as had the district court (see Pet. App. A123), that petitioners' claim was not "limited to site-specific concerns" of the sort that would be raised in challenging individual timber sales, *id.* at A15. The court of appeals further determined that "the underlying nature of [petitioners'] grievance" was a challenge to the "land use decision[]" made in each of the BLM's existing management plans. *Id.* at A16, A17. As the court explained, "if [petitioners] were to succeed on the merits of their NEPA claim, BLM would be required to suspend its management plans" pending the preparation of a supplemental environmental impact statement and reconsideration of its existing timber management plans. *Id.* at A17. The court thus held that Section 314 "precludes this kind of claim" by "explicit statutory command." *Id.* at A17, A18.

7. a. In October 1989, while petitioners' claims under OCLA, FLPMA, and MBTA were pending on remand before the district court, see note 6, *supra*, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750.[9] That "extraordinary measure[]," known as the Northwest Timber Compromise, sought to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). Consequently, Section 318 "sets terms and conditions applicable only for

[9] Congress also extended Section 314 through fiscal year 1990. See note 4, *supra*.

fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." *Ibid.*

In Section 318(b)(6)(A), Congress specifically

> determine[d] and direct[ed] that management of areas according to subsections (b)(3) and (b)(5) of this section [establishing interim management standards] on * * * Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for * * * the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

103 Stat. 747. Section 318(b)(6)(A) further provides that the guidelines for timber sales "adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." 103 Stat. 747.

b. As a result of Section 318's express provisions, the district court, on December 21, 1989, granted the Secretary's motion and dismised as moot for fiscal year 1990 petitioners' remaining claims under OCLA, FLPMA, and MBTA, "without prejudice to the filing of any new action challenging the BLM owl management activities after fiscal year 1990." *Portland Audubon Society* v. *Manuel Lujan, Jr.*, Civil No. 87-1160-FR (D. Ore. Dec. 21, 1989), slip op. 10.

c. Petitioners' appeal from the district court's judgment, which raises a constitutional challenge to Section 318(b)(6)(A), is pending in the court of appeals. *Portland Audubon Society* v. *Manuel Lujan, Jr.*, No. 90-35120 (9th Cir.).

ARGUMENT

Petitioners principally raise a narrow issue concerning the court of appeals' application of Section 314—an appropriations provision that expires at the end of the current fiscal year—to their claim under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, challenging the BLM's decision to continue logging old-growth timber in western Oregon under existing timber management plans—plans scheduled to be replaced by new coordinated plans that will govern logging during the 1990s. The court of appeals' decision, which at bottom upholds factual determinations first resolved against petitioners by the district court, is correct and does not conflict with any decision of this Court or of any other court of appeals. And, since ongoing proceedings involving another related statutory provision, Section 318(b)(6)(A), have largely eclipsed the legal and practical significance of the decision below, see pp. 12-13, *supra*, and since the Secretary is currently formulating timber management plans that will govern timber sales for the next ten-year period (once the pertinent provisions of Sections 314 and 318 have expired), petitioners' claim plainly does not warrant this Court's review.

1. Petitioners contend (Pet. 8-18) that Section 314 does not preclude their claim under NEPA because that claim challenges "particular activities" taken by the BLM under existing timber management plans. Petitioners urge that their claim thus falls within the final proviso of Section 314 that "expressly *reserves* the right to challenge 'any and all particular activities.'" Pet. 9 (emphasis in original); see p. 5, *supra*.

a. As this Court has held in an analogous context, "the facts necessary to a proper determination of the legal question whether an exemption to [a federal statute] applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a) [of the Federal Rules of Civil Procedure], like the facts in other civil bench-tried litigation in federal courts." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713 (1986). Here, both the district court (Pet. App. A123) and the court of appeals (*id.* at A16-A18) found as a matter of fact that petitioners' NEPA claim amounted to a challenge to the BLM's existing timber management plans within the terms of Section 314. On the record presented, petitioners have offered no sound basis for suggesting that those findings are "erroneous," much less "clearly erroneous." And this Court has long declined to review factual findings concurred in by both lower courts. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). This case therefore does not present an occasion for the Court to deviate from its established practice.

b. In any event, the record amply supports the pertinent findings of the district court and court of appeals, and thus petitioners err in claiming that the courts based those findings "upon an *assumption* * * * as to [petitioners'] *motives* in this lawsuit." Pet. 9 (emphasis in original). Petitioners framed their complaint as a direct challenge to the BLM's continued implementation of its existing timber management plans. The complaint challenged the BLM's decision in April 1987 "to continue logging old-growth forests as proposed in the original [timber

management plans]" and alleged that the BLM's "[n]ew resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction." Pet. App. A155 (¶ 14). And petitioners' complaint specifically sought to enjoin the BLM's continued implementation of its existing management plans until the agency complied with its alleged statutory obligations under NEPA. *Id.* at A161 (¶ 31(G)).[10]

In these circumstances, the court of appeals found, if petitioners prevailed on their NEPA claim, the "BLM would be required to suspend its management plans and prepare a supplemental [environmental impact statement], addressing [the] concerns about the northern spotted owl." Pet. App. A17. Accordingly, the record confirms that "the underlying nature of [petitioners'] grievance" was a challenge to the "land use decision[]" made in each of the BLM's existing management plans. *Id.* at A16, A17. As a result, petitioners' NEPA claim fell squarely within Section 314's prohibition against "challenges to any existing plan * * * solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan." 101 Stat. 1329-254.

c. Lastly, petitioners' NEPA claim did not fall within the final proviso of Section 314 that permits judicial review of "particular activities to be carried out under existing [timber management] plans." 101 Stat. 1329-254. Petitioners do not dispute here the district court's finding that the complaint was not

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[10] There is, of course, no more reason for this Court to review the concurrent interpretation of the complaint in this particular case by both courts below than there would be to review the concurrent factual findings of those courts.

grounded on "new information which is site-specific to any proposed timber sale activity." Pet. App. A123. Nor do petitioners challenge the court of appeals' similar finding that their claim was not "limited to site-specific concerns" of the sort that would be raised in challenging individual timber sales. *Id.* at A15. The "particular activities" proviso, however, by its terms applies only to the more commonplace "case-by-case timber sale appeals in site-specific instances" that Congress envisioned. H.R. Conf. Rep. No. 862, 100th Cong., 2d Sess. 76 (1988); see S. Rep. No. 410, 100th Cong., 2d Sess. 122-123 (1988).[11] Accordingly, as both the district court and the court of appeals correctly determined, petitioners' complaint fell outside the safe harbor proviso in Section 314. See also *Oregon Natural Resources Council* v. *Mohla*, No. 89-35350 (9th Cir. Feb. 7, 1990).

2. Petitioners also contend (Pet. 19-25) that Section 314 may not bar their complaint because that provision "repeals by implication" (Pet. 23) the judicial review provisions of the APA. The APA, by its terms, provides that judicial review under the Act is not available where "statutes preclude judicial review." 5 U.S.C. 701(a)(1). Thus, petitioners do not

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[11] Petitioners contend (Pet. 16-18) that legislative history pertaining to the reenactment of Section 314 in 1988, see note 4, *supra*, may not aid a court's construction of that provision as originally adopted in 1987. That contention lacks force where, as here, Congress reenacted the precise language of Section 314 in order to extend the identical operative provisions of the statute, and the legislative history surrounding the 1988 reenactment is fully consistent with the legislative record surrounding the original version of the statute. See Pet. App. A14 n.4. For those reasons, this Court's decision in *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), which petitioners cite (Pet. 16-17), is inapposite.

challenge Congress's power to preclude judicial review of NEPA claims under the APA. And as this Court has made clear, Section 701(a)(1) "limits application of the entire APA to situations in which judicial review is not precluded by statute * * *." *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Here, Section 314 expressly bars judicial review of those claims that fall within its terms. See p. 5, *supra*.[12] In these circumstances, petitioners' contention breaks down. In the APA, Congress has already provided for enforcement of legislation, such as Section 314, that expressly precludes judicial review of particular statutory claims.[13]

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[12] For that reason as well, petitioners mistakenly rely (Pet. 20-21) on *TVA* v. *Hill*, 437 U.S. 153, 188-192 (1978), where the Court found no comparable statutory language exempting the federal project at issue from the requirements of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

Similarly, petitioners err in asserting (Pet. 24-25) that the government's position in this case is inconsistent with the position taken in *California Fish and Game Comm'n* v. *Hodel*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,141 (E.D. Cal. Oct. 29, 1987). There, the government contended that an appropriations provision had not repealed by implication particular statutory authority of the Secretary of the Interior. Here, however, the government has not argued that Section 314 "repealed" the APA or any other provision. To the contrary, as the court of appeals correctly held (Pet. App. A17-A18), Section 314 by its express terms merely precludes judicial review of certain types of claims—a result consonant with the APA, see 5 U.S.C. 701(a)(1).

[13] Petitioners also suggest (Pet. 22-24) that Congress cannot preclude judicial review of their NEPA claim by virtue of an appropriations measure such as Section 314. But this Court has long recognized that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to

3. At bottom, this petition presents a narrow issue concerning the application of Section 314 to petitioners' NEPA claim challenging the BLM's continued logging of old-growth timber in western Oregon under existing timber management plans that have governed certain logging activities for the past decade. Section 314, however, is an appropriations provision that expires at the end of the current fiscal year, and the timber management plans challenged here are scheduled to be replaced by new coordinated plans governing logging activities during the 1990s —plans that the Secretary is currently preparing. Moreover, ongoing proceedings involving another related statutory provision, Section 318(b)(6)(A), have largely eclipsed the legal and practical significance of the decision below. See pp. 12-13, *supra*.[14] In

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an appropriation bill, or otherwise.' " *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)); see *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). Accordingly, petitioners cannot avoid application of the express terms of Section 314 by virtue of that provision's pedigree.

And, to the extent petitioners argue (Pet. 21) that Congress enacted Section 314 in violation of the standing rules of both Houses, petitioners should pursue that claim in the appropriate forum—the Congress, not this Court.

[14] Petitioners recently filed in the district court an application for attorney's fees and other expenses incurred in this lawsuit under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987). In that application, petitioners assert that "[t]his litigation caused Congress to adopt legislation [Section 318] providing greater protection for the spotted owl, and [petitioners] therefore prevailed." Plaintiffs' Appl. for Attorney Fees and Expenses at 11, *Portland Audubon Society* v. *Manual Lujan, Jr.*, Civil Action

these circumstances, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1990

No. 87-1160-FR (D. Ore. filed Jan. 22, 1990). That application stated that

> Section 318 on its face directs [the Secretary] in this case to change its management practices to address the concerns raised by [petitioners] in this case, and awards a congressional "injunction" in the areas which [petitioners] seek to protect, as well as in twelve additional areas.

Appl. at 12-13. The government disputes petitioners' entitlement to fees under EAJA. Nevertheless, petitioners' recent filing in the district court—claiming that "Congress reacted to this lawsuit by awarding [petitioners in Section 318] much of the relief they were seeking in this case" (*id.* at 5 n.4)—cannot be squared with their filing in this Court asserting that further review of the Secretary's alleged violation of NEPA is necessary.

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